

# Legal and institutional fictions in medical ethics: a common, and yet largely overlooked, phenomenon

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A theoretical platform for a much-needed change in the provision of healthcare based on restoring the autonomy of doctor–patient relationships

The resort to pretence in both the process of common law reasoning and the language used by other institutions, generally referred to as legal fiction and institutional fiction, respectively (or simply fiction), is a paradoxical phenomenon. On the one hand, it seems to be incompatible with systems that claim to derive their moral legitimacy from the uncompromising quest for hard evidence, fact and truth. On the other, it has a long tradition going back as far as the time of Roman law.<sup>1</sup> It is very common in, and arguably central to, the modern social institutions. It is frequently manifest even to the lay observer.

Even more perplexing is the fact that this phenomenon has rarely invoked the intellectual interest it begs. Indeed, historical accounts of the common law often discuss it and it does have an entry in most legal dictionaries. Yet, the discourse that both these sources display typically tends to avoid problematisation. Moreover, whereas critical articles and scattered comments on specific instances are fairly common, systematic accounts are scarce. Notable among the latter is a pioneering moral critique by Bentham, a neo-Kantian theory by Vaihinger, a programmatic attempt by Fuller and a relatively recent treatise by Eben Moglen.<sup>2–5</sup> In contrast, critiques of ideology qua false consciousness are, of course, abundant; however, these rarely focus on fictions as such. A recent book, though, regards them as part of a broader culture of deception.<sup>6</sup>

In biomedical ethics, however, this paradox has been even more striking. Although legal and institutional fictions have become pivotal to this domain, as this paper will argue, they have virtually been ignored as such. The author has found only one instance where critiques of a central bioethical doctrine (consent) on grounds of being a fiction had been actively dismissed as logically unsound.<sup>7</sup>

This paper is an attempt to break this silence. However, its three aims are

primarily programmatic. The first is to draw attention to the fact that legal and institutional fictions have indeed pervaded biomedical ethics. The second aim is to suggest a historical explanation of these strange artefacts in an attempt to demystify them. The explanation will be based on the analysis of how both their hegemonic function as well as the relationships of power which exist among their social beneficiaries and victims legitimise and reaffirm each other. This function, however, will turn out to be ideological: although the fictions seem to equally promote the interests of all stakeholders, they consistently promote interests of patients and doctors largely insofar as they are compatible with, and subject to, the interests of the vectors which currently control the agenda of medicine and the production of medical knowledge. Such investigation, however, would be incomplete if it failed to also account for the approach taken by bioethics vis à vis these fictions. Indeed, the third aim of this paper is to encourage bioethicists to undertake such an inquiry.

Embarrassing as the conclusions of this venture might turn out to be, they may offer valuable insights into the social role and history of bioethics and biomedical ethics. More important, though, they may provide a theoretical platform for a much-needed change in the provision of healthcare based on restoring the autonomy of doctor–patient relationships.

## Definition and examples

With minor differences in formulations, most modern law dictionaries define legal fiction as a proposition about the substance or procedure of the legal system purporting to be a principle or rule material to the determination of cases, which rests in whole, or in part, on a factual premise taken to be true by the courts of law, irrespective of whether it is true or false, and even though it might knowingly be false (see “fiction” in *The*

*concise dictionary of law* and *Merriam-Webster’s dictionary of law*).<sup>8,9</sup> The same definition could apply to institutional fiction with the necessary changes having been made.

Moglen distinguishes among fictions based on their subject matter and technique. The subject matter may be the parties’ status or prior transactions in the case before the court; the existence of relationship of third parties, places or things not before the court; the tribunal or the history of the law itself.

The technique may be that of assertion: the truth of the supposition is announced and adopted without scrutiny. It may also be that of deeming: X is deemed to be Y (implying that X is known not to be Y). The most frequent technique, though, is that of presumption: the subject of the fiction seems to be made the object of a formal evidentiary rule; however, the latter either strongly discourages or precludes denial of the subject’s truth. Thus, fictitious presumptions may be said to be either rebuttable or irrebuttable. Indeed, rebuttable presumptions as such are not necessarily fictitious, unless the grounds for rebutting them are artificially narrow. Irrebuttable presumptions are fictitious assertions in a softened guise.<sup>5</sup>

The author has recorded over 40 instances of fictions, some no longer in use. The following list presents a selection of widely recognised instances in no particular order and without going into debate about their role and history.

- Presuming the children of a married woman to be the issue of her husband (the presumption of fatherhood).
- Presuming that defendants in criminal cases are indeed presumed to be innocent until proven guilty.
- Asserting that the island of Minorca is located within the parish of Mary-le-Bow in the ward of Cheap in the city of London.<sup>1</sup>
- Asserting that a particular populated territory is empty of human habitation (the doctrine of extended *terra nullius* [“land of no one”]).<sup>10</sup>
- Presuming that a defendant in a criminal case either knows the law or has been willfully blind to the law (ignorance of the law is no excuse).<sup>11,12</sup>
- Presuming that prejudicial effects are overcome by instructions to the jury.<sup>13</sup>
- Presuming that a person under oath would not lie.
- Deeming a corporation to be a natural person (corporate personhood).
- Presuming buyers of commodities to be perfectly competent as such (the customer is always right).<sup>14</sup>

It is commonly maintained that fictions are used for convenience and consistency in order to overcome the rigidity of the law. Fictions are also said to be distinguished from both erroneous claims as well as lies, in that they are always created by and for agents who are fully conscious of their nature and role. This, however, is rarely so, as the case of the bioethical fictions will clearly demonstrate. Many fictions go unnoticed. Moreover, although a social explanation of their role does not depend on evidence of intentions to deceive, it does not preclude the presence of such intentions, at least occasionally.

### Legal and institutional fictions in biomedical ethics

This section presents a discussion of several instances, which the author regards as fictions in biomedical ethics. It should be emphasised that this account claims to be neither non-contentious nor complete. It should rather be seen as an invitation both to debate these instances and to continue the search for additional ones. One should also note that a particular instance may not be used by all legal or institutional systems and that a system which does use it may not do so consistently.

#### Consent

- Effective consent (legally and institutionally valid consent/refusal) as such is bound to be a legal fiction, because it presupposes a certain degree of autonomy, but rarely, if ever, reflects it. This widely unrecognised fact is deduced from the presence of an almost invariably unbridgeable discrepancy between what the primary legal implication of effective consent presupposes about the degree of the individual's task-specific autonomy and the degree of the task-specific autonomy, which can be guaranteed by the standards that need to be met in order to legally validate that implication. Thus, although the primary legal implication of effective consent—full privatisation of the responsibility for one's choice—presupposes nothing short of perfect autonomy, the standards that validate this implication can only guarantee what has been described as reasonable autonomy.<sup>7</sup>
- As full and exclusive responsibility presupposes perfect task-specific autonomy, the latter must equally presuppose perfect task-specific capacity, perfect disclosure and perfect voluntariness/non-coercion. Such perfections are fictions, because the standards that are used to validate each

one of them cannot, and are not said to be able to, do so.

- A specific fiction pertaining to mental capacity is the presumption that an adult who shows no signs of lack of capacity has capacity.
- A specific fiction pertaining to adequate disclosure is the presumption that an individual who has no further questions has got all the information he or she could possibly need or want. Indeed, the law often rejects such presumption, especially in relation to disclosure of risks. However, the presumption may still be implicit in other cases. For example, information about the use of animals in research involving human tissue is normally withheld from the donors of the tissue, without this affecting the adequacy of the disclosure, hence the validity of their consent. Of course, the donors do have an opt-in right to receive such information. However, if they failed to ask for it, they would be presumed to not have wanted it in the first place. This presumption is fictitious (perhaps even deliberately misleading), because in reality, many people who would find such information relevant would still not ask for it for reasons that have nothing to do with their will.
- The presumption that opt-out consent (a form of presumed consent) necessarily implies consent is a specific fiction pertaining to voluntariness/non-coercion. True, it would not be so, if one showed that all those who did not opt out of the intervention in question would have opted in anyway. A recent study, however, gives unsurprising evidence to the contrary. It shows that an opt-in approach in research results in lower recruitment rates compared to an opt-out approach.<sup>15</sup>
- Deeming a personal or professional legal representative to be the legal guardian of an incapacitated patient is a fiction. Recently created by the UK Department of Health, these agents are asked to give consent to involving patients in clinical trials of medicinal products in emergency settings as if they were their legal guardians. Such consent was recently described as “a fairly meaningless ritual”.<sup>16</sup> Indeed, it is “meaningless” in the sense that it cannot guarantee what it purports to guarantee. This, however, does not preclude the possibility that it has other roles which it fulfils, indeed, very meaningfully.

To say that consent is a fiction is another way of saying that its validators (tests and standards) have high rates of

false-positive results. In practice, this means that full responsibility is imposed on patients who are not fully responsible for the choices they make. At the same time, the fiction exempts society, the state, healthcare institutions and the medical-industrial complex from responsibility for the patient's choice. In this respect, the fictions of consent, autonomy and choice exhibit stark resemblance to the *caveat emptor* principle.

True, these fictions combat medical paternalism quite effectively. Ironically, though, both the decline of the latter as well as its substitution by a restricted notion of patient autonomy have been necessary preconditions for exposing patients to some cynical forms of neo-paternalism, now practiced mainly by market-driven forces. All in all, the ideological function of these fictions suggests that they have pervaded biomedical ethics primarily, albeit not exclusively, against the background of the currently intensifying global economic competition, the decline of the Welfare State and the concomitant commercialisation of public healthcare.

#### Hastening death of patients

- The presumption that clinical decisions to withhold/withdraw life-sustaining treatment from patients with irreversible loss of consciousness are made in their best interests is a fiction.<sup>17 18</sup> It is doubtful whether such patients have any interests at all.
- Deeming withdrawal of life-sustaining treatment to be philosophically different from active euthanasia with other things being the same is a fiction.<sup>19</sup>
- Deeming refusal of life-saving treatment to not be tantamount to attempted suicide is a fiction. Deeming respect for such refusal to not be tantamount to physician-assisted suicide is equally fictitious.
- Deeming clinical decisions that necessarily hasten patients' death, which are said to be ethically motivated (best interests or respect for autonomy), to not be motivated by a desire to bring about the patient's death is a fiction (the rule of double effect).<sup>20 21</sup>

These fictions may play a particularly disturbing role. Behind the veil of both ethical language as well as genuine compassion for patients, they may conceal from doctors some other pressures, mainly economic, which may seem unacceptable to many. In doing so, the fictions may turn unsuspecting doctors into shortage managers on behalf of a cost-containing system. In turn, the white gown of the latter further conceals such pressures from patients as well.<sup>22</sup>

### Human research ethics

- Deeming paid participants in research to have volunteered to participate is a fiction. Paid participants are vendors, not volunteers. What they sell is their body.
- Deeming incapacitated participants in research to be subjects is a fiction. For all practical purposes, they are objects.
- The presumption that placebo control is used in drug trials primarily for scientific grounds is a fiction used by the pharmaceutical industry. Its primary purpose, at least as far as the latter is concerned, is rather to avoid the relatively high risk of failure associated with head-to-head trials.<sup>23</sup>
- The presumption that National Health Service research ethics committees are independent was recently exposed as fictitious by a committee set up by the UK Department of Health.<sup>24</sup> Ironically, to tackle this problem, among other things, the same committee advocated a reform based on four new fictions: the presumption that a paid technocratic membership would be independent; the presumption that National Health Service hosts would perform an objective site-specific self-assessment; the presumption that the scientific review of research applications, which may now be performed by close colleagues of the researchers without the cloak of anonymity, would be independent and objective; the presumption that all social stakeholders have an equal interest in a reform based on the aforementioned fictions.<sup>25</sup>

These fictions do little than conceal and thus reaffirm the control of private market forces over the production of medical knowledge.

### Conflicts of interest

- The presumption that disclosure of conflicts of interest in publications provides sufficient protection against conflicts-of-interest-related bias in research is fictitious.<sup>26</sup>
- The presumption that disclosure of conflicts of interest provides sufficient protection against similar bias in prescribing for, treating or referring patients is a fiction.<sup>27</sup>

Ironically, the presumption that the sole purpose of disclosure in such contexts is

that of creating transparency is by itself a fiction. In fact, transparency is a very powerful means of concealing and reaffirming bias. This is because it is often construed as sufficient precaution against such bias.

### Commerce in organs

- The presumption that unrelated donations of biological materials/services which are said to be altruistically motivated are indeed so is a fiction.<sup>28</sup> In fact, such donations are most often financially motivated and have little to do with altruism.
- Deeming compensation/reward/expenses for unrelated donations of body parts or services not to be tantamount to commerce in the body is a fiction. For many donors, money, however little, is the primary motivation.

These fictions conceal a back-door legitimization of commerce in organs. More important, though, they conceal the coercion that is implicit in all situations where selling one's organs becomes a real option.

### CONCLUSIONS

Legal and institutional fictions are a common phenomenon in biomedical ethics. However, the bioethical discourse has generally given them a cold shoulder. This paper has tried to offer a consistent explanation in an attempt to demystify these fictions. It has depicted both as well as the apologetic silence with which they have been met, as ideological constructs, concealing, and thereby legitimising and reaffirming, relationships of power within which patients and doctors are rather the weaker parties. Embarrassing as such conclusions may be, they are too substantial to ignore, especially by those who have genuine interest in restoring the autonomy of doctor-patient relationships.

*J Med Ethics* 2007;**33**:362-364.  
doi: 10.1136/jme.2006.017277

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Received 3 May 2006  
Revised 21 June 2006  
Accepted 25 June 2006

Competing interests: None.

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